

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Given v State of Queensland (Queensland Police Service)*
[2019] QCAT 16

PARTIES: **MARISSA ANNE GIVEN**
(applicant)
v
**STATE OF QUEENSLAND (QUEENSLAND
POLICE SERVICE)**
(respondent)

APPLICATION NO/S: ADL054-17

DELIVERED ON: 18 January 2019

HEARING DATE: 5 March 2018

HEARD AT: Brisbane

DECISION OF: Member Paratz

ORDERS: **The Complaint is dismissed.**

CATCHWORDS: HUMAN RIGHTS – DISCRIMINATION
LEGISLATION – DIRECT DISCRIMINATION –
INDIRECT DISCRIMINATION – where an Aboriginal
woman who suffered from post-traumatic stress disorder
had a back condition and was intoxicated, was forcibly
placed in a smock in a padded cell at the watch-house –
where it is alleged that excessive force was used – where
Aboriginal support services were not present – whether
applicant was treated less favourably by police – whether
applicant was required to comply with terms with which
she could not comply due to her post traumatic stress
disorder and her spinal condition

Anti-Discrimination Act 1991 (Qld), s 8, s 10, s 11, s 101

Cook v State of Queensland (Queensland police Service)
& Anor [2018] QCAT 216

*Purvis v State of New South Wales (Department of
Education and Training) (2003) 217 CLR 92*

Woodforth v State of Queensland [2017] QCA 100

APPEARANCES &
REPRESENTATION:

Applicant: K Gover of Counsel, instructed by Antigone Legal

Respondent: S Anderson of Counsel, instructed by QPS Legal

REASONS FOR DECISION

[1] Marissa Anne Given is an Aboriginal woman. She was arrested by police at her home at Spring Hill in Brisbane, around 4:50pm on Saturday afternoon, 1 October 2016, on charges of public nuisance and obscene language, and was taken to the Roma Street Watch-House ('the watch-house') in Brisbane.

[2] She was processed at the watch-house, and detained there.

[3] She filed a complaint with the Anti-Discrimination Commission Queensland ('ADCQ') on 20 October 2016 alleging that she had suffered discrimination because of her race and sex, and set out the following details:¹

Laughed at by female officers when requested to contact Murri Watch and asked for ATSILS, PLO to be notified that I am in the Roma Street Watch-house.

Forced to take clothes off without any privacy then got rough treatment in the padded by 3 females officers.

Also ticket for public nuisance was not on transport dept record when I went to pay it.

[4] The complaint was referred to the Tribunal on 1 June 2017. A Compulsory Conference was conducted on 21 August 2017, but the matter was not resolved.

[5] I heard the matter in an Oral Hearing over three days on 5, 6 and 7 March 2018, and reserved my decision. Following the hearing, written submissions were dated and (filed) as follows:

(a) State of Queensland's submissions

(i) 29 March 2018 (29 March 2018) – 11 pages

(b) Ms Given's submissions

(i) 2 April 2018 (24 April 2018) – 33 pages

(c) Ms Given's submissions in reply

(i) 20 April 2018 (20 April 2018) – 13 pages

(d) State of Queensland's submissions in reply

(i) 24 April 2018 (26 April 2018) – 17 pages

(e) Ms Given's submissions in further reply

(i) 8 June 2018 (8 June 2018) – 13 pages

[6] This is my decision in the matter.

¹ Complaint to ADCQ, 7.

Evidence

Marissa Anne Given

[7] Ms Given gave evidence that she was born in 1971. She was therefore 45 years of age at the time of the events.

[8] She stated that she had been in several very violent relationships and had suffered tragic losses, and suffered from Post-Traumatic Stress Disorder ('PTSD') as a result,² which was diagnosed in 2003.³ She stated that she was able to get the Disability Support Pension in about 2003 as a result of that diagnosis and had been in receipt of that pension since that time.⁴

[9] She stated that she had come into contact with the Queensland Police Service during the period from 2001 to 2015 for drinking and nuisance related matters and was taken into custody on several occasions. Ms Given stated that she had been in the watch-house 'a few times' but had not been in prison.⁵ She stated that on those occasions she had provided information about her PTSD and anxiety along with other medical conditions.⁶

[10] She stated that she had a back problem as follows:⁷

I also have a back problem – it was originally a work injury from manual work, waitressing and hospitality. It is extremely debilitating, I struggle with walking any significant distance and with stairs. There is some degeneration in my spine. It is painful. I am slightly built, very thin, I walk very slowly, almost with a shuffle and have to carry a little back pillow so that I can sit. There is information about my back injury in the referral material that the ADCQ sent to QCAT and I rely on that. When I have been drinking my pain is a little bit less but it's still pretty bad.

[11] She stated that the arrest in question resulted from a noise complaint from a male friend of a female neighbour who told her to turn her music down. She was issued with an infringement notice for the offences in the sum of \$121.00 which she has paid.⁸

[12] She stated that she was pretty mad at her neighbour and her friend for calling the police and bringing trouble,⁹ and yelled out to them and the police as follows:¹⁰

I yelled out off the balcony at them all talking together, I probably yelled some things like 'youse are pissing me off, why don't you just go away. I've done what youse have said and turned off the music now just piss off, why are you talking to her she doesn't even live here – you don't even live here just piss off – this has got nothing to do with you. You won't fucking go, why aren't you going?' I might've made some comments about the police like

² Affidavit Marissa Given filed 13 December 2017, [2].

³ Ibid, [5].

⁴ Ibid, [6].

⁵ Ibid, [8].

⁶ Ibid, [9].

⁷ Ibid, [13].

⁸ Ibid, [15].

⁹ Ibid, [17].

¹⁰ Ibid, [18].

‘fuckin cops’ or something – I was pretty angry. The police called back ‘if you don’t be quiet we’ll come back up’ which they eventually did.

[13] She stated that she recalls feeling extremely, uncontrollably distressed when she was in the watch-house and was terrified, and believes she was not mentally well on that day,¹¹ and that she called out for help which was denied to her.¹²

[14] She stated that she was asking for Aboriginal and Torres Strait Islander Legal Service (‘ATSILS’) or Murri Watch (an Aboriginal service), and thought she was going to die, and that she would be another death in custody.¹³ She believed that she was handled aggressively and that was because of her race and because she was sick on that day with PTSD, and that the police did not want to handle it properly by calling ATSILS or Murri Watch.

[15] In her evidence she described how she felt at the watch-house:¹⁴

Ms Gover: The incident on the 1st of October 2016, I’m just going to ask you how you felt at certain points during that night, and if you could describe how you felt at certain points during that night, and if you could describe your feelings at those moments. How did you feel when you first arrived at the watch-house and the doors of the van were opened?

Ms Given: Scared. Because there were so many police officers waiting for me and I had not resisted at all. I complied with their orders.

Ms Gover: And when you were in the padded cell with the female officers directing you to undress, how did you feel then?

Ms Give: Degraded. Put down. Horrible. Very horrible. And hurt, very hurt. Didn’t like it at all, one bit.

Ms Gover: And how did you feel about their direction that you undress?

Ms Given: I didn’t like it to be told. I would’ve – have done it without being cornered like an animal and forced to get – taken my top off and then stripped down with my pants down and getting pinned down. I didn’t like that at all. At all. Felt very scared.

[16] Ms Given said that she suffered injuries to her face and arms, and an injury to her left shoulder which was caused when the officers pulled her arm back when she was pinned down.¹⁵

Ms Philpot

[17] Ms Philpot, a psychologist who works with the Brisbane Streetlevel Mission, gave evidence that Ms Given had been seeing a student counsellor under her supervision since November 2015 and had been her patient directly since 2017. She said that Ms Given’s symptoms suggested that she was suffering from PTSD at the time of the police incident.

¹¹ Affidavit Marissa Given filed 13 December 2017, [22].

¹² Ibid, [24].

¹³ Ibid, [26].

¹⁴ Transcript 20180305, 1-12, line 15.

¹⁵ Transcript 20180305, 1-16, line 46.

- [18] Ms Philpot said that it was possible that the way Ms Given was reacting was enhanced by the fact that she had been consuming alcohol for four hours before she encountered the police on that day.¹⁶

Cathy Stewart

- [19] Ms Stewart is a physiotherapist who treated Ms Given prior to and after the incident in question. She described Ms Given's presentation overall:¹⁷

Ms Stewart: So she had some pre-existing lumbar and some pre-existing neck but her prime complaint when she came to me was of the left thoracic region with some – some in the neck and some spread to the low lumbar but mostly in that thoracic region which I thought was commensurate with how she described the injury occurred. That would have crushed the disc and pressed on the nerve and given those symptoms. Now, overtime, those symptoms can improve to – to a varying extent. I don't really think that her pre-existing low lumbar would have any direct – necessarily any direct bearing on the thoracic pain.

Dr Bradley Ng

- [20] Dr Ng is a psychiatrist. He examined Ms Given after the events for the purpose of conducting a psychiatric assessment as to whether Ms Given had developed a mental disorder given the event in October 2016, and to produce reports.

- [21] In a supplementary report dated 11 December 2017 Dr Ng made the following comments:¹⁸

I have reviewed the provided video footage. It outlined Ms Given having a number of interactions with various staff at the watch-house and spending time in a number of cells. Initially, Ms Given was angry and swearing at times but persistently requested support, including an Aboriginal liaison officer.

As the situation developed, she became increasingly scared and agitated. She did not want to be touched. She indicated she was scared of being hurt or assaulted, I did not hear any threats of suicide or physical violence. She indicated distress about being confronted and led to the padded cell and then ordered to put on a vest.

In my opinion, there were clear symptoms of mental distress characterised by fear and anxiety beyond the circumstances one might normally anticipate. I can only hypothesise that this has emerged from Ms Given's perception that she was being discriminated against because of her ethnicity and increasing concern that she was isolated from her legal and usual supports.

- [22] Dr Ng was asked in cross-examination as to whether his opinion had changed in the course of it:¹⁹

Ms Anderson: Now, there are two things I'd like to ask you about. Would it be right to say that given the information that you've been provided during the

¹⁶ Transcript 20180306, 2-21, line 34.

¹⁷ Transcript 20180307, 1-79, line 21.

¹⁸ Transcript 20180307, 1-103, line 3.

¹⁹ Transcript 20180307, 1-124, line 16.

course of this cross-examination, you can no longer be confident that Ms Given's post-traumatic stress disorder had been in remission for several years?

Dr Ng: I would...I'm not as confident as I was before. In saying that, if there is ongoing psychopathology emerging from other issues, such as Ms Given's miscarriage, those symptoms, while they are significant, would not necessarily be described as a post-traumatic stress disorder. So therefore they would be considered under another diagnosis. In that situation, a post-traumatic stress disorder could emerge from remission, but it would be hard to say that Ms Given was completely free of all psychopathology when the event occurred on the 1st of October 2016.

Hayden Mitchell

- [23] Mr Mitchell is a Senior Constable. He had worked for the police force for about 10 years at the time of the incident. He was one of the arresting officers and described the circumstances leading to Ms Given arriving at the watch-house:²⁰

Ms Anderson: All right. And go on. There was another person you spoke to?

Mr Mitchell: Then I think it was the visitor from next door, not the actual resident, I was talking to her and then Miss Given just started calling – shouting down at us, yelling out 'What are you going to do about the crack dealers here, cunts' and I can't remember exact but I warned her using the – calling me a 'cunt' from up there – at least once. She – I remember 'dog cunt' was the last one, was the reason why I then went up to her apartment.

She came to the door, I opened it. She tried to prevent us from getting in but my – my partner and I leant on the door, she's come out or she's – I've taken hold of her wrist. My partner's opened the door, led her out of the room, her apartment. We've used the one – number one come along hold, which is under her armpit and wrist, walked her down the stairs. She was slightly obstructive and was pulling and anyway, walked her down the stairs. She was complaining that her back was sore and calling out that she had sciatica. So once we were down the stairs, because I wasn't convinced she would make it on her own, after we walked her down, we let her go when she was complaining about her back. She wasn't handcuffed. We – as in we let her go as we weren't – we were still holding onto her but we weren't forcing her to move. We let her stop on the occasion when she needed to stop. When we got to the back of the police van I think David – Senior Constable McCall was there. He opened the back of the van for us. We let Miss Given get herself in the van. When I explained to her how to do it, she did that on her own accord, closed the door, went to the watch-house. Once at the watch-house, because she's a female and we didn't search her as well as she would be searched if she was a male. She was searched but not – so females came out and they – well, she – I believe she got herself out of the van again and then was searched by females and placed in a holding cell. Then I went in and began my paperwork.

²⁰ Transcript 20180307, 1-86, line 41.

Carmel Hull

- [24] Ms Hull is a Senior Constable. She gave evidence as to the staff on duty on the day of the incident. She recounted what happened when Ms Given first arrived at the watch-house in the police van:²¹

Ms Anderson: What happened there?

Ms Hull: As to my memory, she didn't want to get out of the van. She indicated something about having a sore back, and she asked for help, and that's why I held my hand out to her, and she took it, and both Mardi Holst and I walked her over to where I needed to search her. I do recall when she was – in the vehicle lock, they have drawn yellow feet on the floor, and that's where we ask people to stand to search them, and we ask them to stand up against the wall and place their hands on the wall with their feet on the yellow feet that were drawn on the floor, and she – I do recall her saying to me 'Don't touch me'. And I do recall saying to her 'No, I have to touch you. It's my job. I have to search you. I have to do a pat-down search. I'm going to have to place my hands on your body and rub my hands over your body to make sure you don't have anything on you that may hurt yourself or someone else' and telling her who I was.

- [25] Ms Hull was later asked about holding Ms Given down before she left the padded cell:²²

One knee – one knee was there on her bottom. You see, before I got out of the cell, she was up, and usually, I would put one knee on her bottom and one knee on her shoulder and hold her there. I didn't do that on this occasion. I was trying to use - and not hurt her, use the least force possible. That's why I had one knee on her bottom, and she got up before we actually left the cell, so my technique wasn't that effective. You can see, right now, we've left the cell. We asked her to put the smock on herself. Now she's doing it. That's what we wanted her to do when we were standing there asking.

Deborah Haigh

- [26] Deborah Haigh is a Senior Watch-House Officer. She was on duty at the time of the events.
- [27] Ms Haigh was asked about attendance at the watch-house by a PLO ('Police Liaison Officer') or Murri Watch:²³

Ms Anderson: Now, the PLO, what is that?

Ms Haigh: Police Liaison Officer

Ms Anderson: And is that someone – do you have one of those stationed at the watch-house in Brisbane?

Ms Haigh: No we don't

²¹ Transcript 20180307, 1-9, line 37.

²² Transcript 20180307, 1-23, line 1.

²³ Transcript 20180306, 2-67, line 21.

Ms Anderson: How long has it been since you've had someone, or has there been someone during the three years you've been there?

Ms Haigh: I've been here for nearly three years and I haven't seen one.

Ms Anderson: All right. During the course of the video as I say, Ms Given has asked for a PLO or a Murri watch. Would you be able to summons someone as an officer at the watch-house?

Ms Haigh: If they were – say if they'd been to court and then they'd – they needed company and Murri Watch, but normally we wouldn't get them in just because somebody had come in as a public nuisance.

- [28] Ms Haigh said that there were rules for watch-house officers, and that females searched females. She said it was safer to strip an offender in the padded cell, as it was a safer cell than one having a toilet bowl or cement floor in it. She described the floor and the walls as like a thick sponge that was soft.
- [29] She said that she and the other officer had to kneel to maintain hold of Ms Given's arms.
- [30] Ms Haigh said that a smock was used as a suicide prevention device, that the fabric did not tear, and did not have any buttons or fastenings. She was asked why a smock was put on Ms Givens:²⁴

Ms Anderson: And why did you want to put that on Ms Given?

Ms Haigh: The only two reasons why the Sergeants would ask us to put them on is if they haven't answered all their health questions properly and because in those health questions are: 'Have you attempted suicide?' 'If so, how long was your last suicide attempt'. You also look for self-harm marks on their bodies when they're at the charge counter.

Ms Anderson: Right?

Ms Haigh: If they don't answer those questions its automatic that they get put in a smock.

- [31] Ms Haigh said that Ms Given had refused to answer any medical questions:²⁵

Ms Anderson: All right. Okay. And so she was arrested for public nuisance?

Ms Haigh: mmm

Ms Anderson: And then if you just turn over, there on the third page it says 'log type medical', toward the bottom of the page?

Ms Haigh: Yes.

Ms Anderson: At 5:24 or 17:24?

Ms Haigh: So she refused all the medical questions.

Ms Anderson: So are those the medical questions you were referring to then?

²⁴ Transcript 20180306, 2-73, line 36.

²⁵ Transcript 20180306, 2-74, line 40.

Ms Haigh: Yes

Ms Anderson: And what does it mean that she's refused them all?

Ms Haigh: She hasn't complied when she was at the charge counter when they've asked her the health questions.

Ms Anderson: All right. And then underneath of the medical questions there's a – sorry, above it, there's the name Falloon T?

Ms Haigh: He was one of the shift sergeants on that shift.

Ms Anderson: All right. And then if you go down further on page 4 of five: *Prisoner was argumentative towards watch-house staff and refused to comply*

Ms Haigh: Mmm *made of her. Prisoner refused to answer any medical questions, so was changed into a smock.* Is that what you were referring to?

Ms Haigh: That's protocol. Yeah.

Mardi Holst

- [32] Ms Holst is an assistant watch-house officer. She said she had worked at the watch-house for coming up to 10 years. She was asked about the questions that Ms Given was asked when she arrived at the watch-house:²⁶

Ms Gover: Do you recall anybody telling Ms Given why she had to go to the padded cell?

Ms Host: I recall the charge sergeant was attempting to ask the risk assessment questions. I – I recall Ms Given wasn't listening to the Charge Sergeant's questions and didn't answer any of his questions, as he was attempting to, and the decision was made by him not to – because she was an unknown risk, didn't answer any questions whatsoever, the decision was made to place her in a smock.

Dr Robert Hoskins

- [33] Dr Robert Hoskins gave evidence. He had been employed as a forensic physician in Queensland Health's Clinical Forensic unit, was deputy director of the unit for two years, and director of the unit for 10 years. He was asked about an expression in a report he had prepared where he said as to Ms Given that:²⁷

...her behaviour in the watch-house was of a similar character and typical of someone who's intoxicated by alcohol

- [34] Dr Hoskins was asked as to his observation of the symptoms Ms Given was displaying, and to comment in relation to displaying symptoms of PTSD:²⁸

Ms Anderson: You – you used the words there at paragraph 24: *However, it does not flow over to external signs of PTSD that would result in behaviour otherwise typical of a drunk*

²⁶ Transcript 20180307, 1-66, line 15.

²⁷ Transcript 20180306, 2-34, line 40.

²⁸ Transcript 20180306, 2-35, line 37.

Ms Anderson: Yes. What – what does that mean?

Dr Hoskins: What sh – as I say – what she described didn't contain – at any point – what then led to the behaviour. It was just a – a – a description – to my mind of what was going on in her head. But that then didn't lead to something happening which we could see or hear.

Ms Anderson – And you follow on at paragraph 25 when you say: *What police observed was all the outward appearances of a noisy drunk without any other features that may have led them to think of another explanation.* By that, do you mean that's what you observed?

Dr Hoskins: Yes

Ms Anderson: All right

DrHoskins: You can go into the watch-house pretty much any time day or night, and there'll be somebody in the front holding cells who's intoxicated, who is behaving in a similar way.

Ms Anderson:How many times have you been into a watch-house?

Dr Hoskins: Probably 100 to 150 times a year over 14 years.

[35] Dr Hoskins looked at photographs of Ms Given taken after the events and said that he believed he could observe swelling of the right side of her face, and said the single most likely cause was abrupt contact between that part of the body and a solid object, and said that 'If you slam somebody's head into the floor it would do it'.

[36] Dr Hoskins was asked about the possible causes of Ms Given's back pain:²⁹

Ms Anderson: And what would that tell you about the cause of her back pain? Would it be from a degenerative spinal condition or would it be from something else or could it be from a combination?

Dr Hoskins: It could be – we know from these scans that she has disc disease, we know that she has facet joint disease, which are the small joints at the back of the spine that allow them to rotate and bend with respect to each other. They also afford a degree of protection to the nerves. Sorry, what was the question again?

Ms Anderson: The question is can you tell from looking at the materials, that is the records and the scans, what the cause of her back pain is?

Dr Hoskins: There are causes plural. The facet joint and the disc prolapse are documented. If she had tenderness she would almost certainly have muscle spasm. Muscle spasm can occur in its own right, it can occur secondary to facet joint disease, it can occur secondary to disc disease. No, I can't pick between them.

Submissions of Ms Given

[37] The submissions made on behalf of Ms Given described the situation as follows:³⁰

²⁹ Transcript 20180306, 2-60, line 29.

³⁰ Submissions on behalf of the Applicant filed 24 April 2018, [1], [2].

1. The applicant, Marissa Given, is an Aboriginal woman suffering from post-traumatic stress disorder (PTSD) and a degenerative spinal condition. On 1 October 2016, she was arrested at her home and taken to the Brisbane Watch-House. While in custody, she was placed in a padded violent detention cell (VDC) and forcibly changed into a suicide smock.

2. As a result of her handling by officers of the Queensland Police Service (QPS), Ms Given has developed further injuries in her neck and thoracic spine and a resurgence of her PTSD symptoms. These symptoms have improved with treatment but continued at the time of hearing.

[38] It was submitted that the State had sought to establish that Ms Given was drunk, but that her agitation was consistent with symptoms of PTSD and she did not exhibit other physical characteristics of drunkenness, such as stumbling. It submitted that the evidence of Dr Ng and Dr Philpott was equivocal and could indicate a number of causes, including PTSD.³¹

[39] It was submitted that Ms Given exhibited symptoms of PTSD and a degenerative spinal condition in the watch-house; that watch-house staff breached protocols in their dealings with Ms Given; that Ms Given's pre-existing PTSD was aggravated by the incident in the Violent Detention Cell ('VDC'); and that Ms Given suffered short and long-term physical injuries as a result of the incident in the VDC.

[40] The discrimination by the watch-house officers against Ms Given was submitted as being as follows:³²

...in the area of State laws and programs within the meaning of, and as prohibited under, s 101 of the Act, in that they were:

(a) Performing functions and exercising powers and responsibilities under State law; and

(b) Discriminated in the performance of those functions, in the exercise of that power and in the carrying out of those responsibilities.

[41] It was submitted that to establish direct discrimination under the *Anti-Discrimination Act 1991 (Qld)* ('the Act'), Ms Given must prove that she was treated less favourably than a comparator would have been treated in circumstances that are the same or not materially different. A comparator was described as a person who:³³

a) was brought to the watch-house for a ticketable offence and managed by police officers

b) was mildly affected by alcohol, with a BAC of between 0.027 and 0.079

c) does not have PTSD and a degenerative spinal condition

d) did not exhibit behaviour characteristic of a person with PTSD and a degenerative spinal condition, and

e) is not an aboriginal person.

³¹ Ibid, [68].

³² Ibid, [85].

³³ Ibid. [90].

[42] It was submitted that Ms Given contends that the State directly discriminated against her by treating her less favourably than the comparator would be treated in the circumstances that are the same or not materially different by:³⁴

- (1) Assuming she was drunk and/or belligerent and uncooperative;
- (2) Failing to recognise her behaviour as symptomatic of PTSD;
- (3) Failing to adapt their behaviours in a way that would calm her psychiatric symptoms;
- (4) Placing her in a VDC;
- (5) Requiring her to wear a suicide resistant smock;
- (6) Assuming she was 'faking' back pain while being changed;
- (7) Unnecessarily detaining her in the VDC for one hour and failing to release her at the earliest reasonable opportunity; and
- (8) Treating her in a way that was degrading and without regard to her dignity.

[43] It was contended by Ms Given that the State indirectly discriminated against her by imposing terms that required her to:³⁵

- a) cease exhibiting behaviour symptomatic of PTSD; and
- b) comply with a physical hold that caused pain and injury due to her spinal condition.

These terms were:

- c) terms with which the applicant could not comply because:
 1. she has PTSD, which was triggered by circumstances out of her control while she was at the watch-house; and
 2. she has a degenerative spinal condition and could not tolerate certain restraining holds
- d) terms with which a higher proportion of people without those attributes comply or are able to comply; and
- e) not reasonable.

[44] It was submitted that Ms Given suffered loss in that her pre-existing PTSD was aggravated by the incident in the VDC causing her symptoms, which include hypervigilance, angry outbursts, nightmares, avoidance behaviours, teariness and anxiety, to increase significantly. It was also submitted that she suffered short and long-term physical injuries.

³⁴ Submissions on behalf of the Applicant filed 24 April 2018, [93].

³⁵ Ibid, [95].

- [45] Her long-term physical injuries were submitted to be described by physiotherapist Ms Stewart as ‘(L) lateral neck and thoracic pain and parathesia’.³⁶
- [46] Ms Given sought orders that the Police Service implement policies for the non-discriminatory treatment of people with mental illness and indigenous persons in custody. Reference was made to a lack of regard to a memorandum of understanding between ATSILS and QPS; to a lack of awareness by watch-house staff of the broad role and services offered by ATSILS and Murri Watch, and of the findings of the Royal Commission into Aboriginal Deaths in Custody.

Submissions of the State of Queensland

- [47] The State of Queensland (‘the State’) submits that the officers responded to Ms Given’s behaviour, and that their actions were responsible in the circumstances and not due to any discrimination:³⁷

30. The respondent does not accept that Ms Given’s behaviour was as a result of her condition of post-traumatic stress disorder or a back injury because the evidence does not support this assertion. Ms Given did not put on evidence that her behaviour was ‘characteristic of a person with PTSD and a back injury’. The evidence of Dr Hoskins makes clear that Ms Given’s behaviour is consistent with someone being affected by alcohol. Moreover, he says that Ms Given’s blood alcohol level was at least .1% at the time police arrived at her house. Further, there is no explanation related to PTSD for why Ms Given was polite and compliant when S/C Mitchell arrived at her house and then became belligerent – so much so that she was arrested. She said she was angry because the police were talking to her neighbour’s guest. Dr Ng alluded to the fact that some people just behave that way.

31. The respondent says that it does not matter whether Ms Given’s behaviour was caused by alcohol, a personality issue as suggested by Dr Ng, or PTSD because the officers in the watch-house are required to deal with the behaviour of the person in front of them for the safety of all involved. At the time of her arrest and detention, the officers dealing with her were dealing with a person who was non-compliant. There is no evidence that the police officers assumed that Ms Given was drunk. They could see that she was belligerent and uncooperative. The police officers who arrested Ms Given made the assessment that Ms given was moderately affected by alcohol. The watch-house officers could smell alcohol on her.

32. No officer assumed that because she was aboriginal she would be drunk, belligerent and uncooperative with officers as she alleged. In fact, when Ms Given first encountered S/C Mitchell at her house she was polite and compliant. When she first encountered S/C Hull and WHO Holst in the watch-house, she was polite and compliant. Each officer gave evidence that they followed police procedure and dealt appropriately with the behaviour being presented to them.

- [48] It is submitted for the State that the question which the Tribunal must ask is whether a person behaving in a belligerent and uncooperative way can be dealt with in

³⁶ Submissions on behalf of the Applicant filed 24 April 2018, [105].

³⁷ Submissions on behalf of the Respondent filed 29 March 2018, [30] – [32].

accordance with police operating procedures notwithstanding that that person claims that the reason for their belligerent and uncooperative behaviour is an impairment.³⁸

- [49] The State relies upon defences in s 104 and s 108 of the Act authorising its officers to undertake their acts in the watch-house if they are found to be discrimination under the Act. Section 104 of the Act allows a person to do an act to benefit the members of a group of people with an attribute for whose welfare the act was designed if the purpose is not inconsistent with the Act. Section 108 of the Act provides that a person may do an act that is reasonably necessary to protect the health and safety of people at a place of work.

Discussion

- [50] There is general agreement between Ms Given and the Police Officers as to the broad events of the day - as to the sequence of events, and as to the occurrence of major incidents: the events at the unit, her transport to the watch-house, her admission to a Violent Detention Unit, her transfer to a holding cell, and her discharge from the watch-house.
- [51] There is dispute as to the handling of Ms Given at the watch-house generally and particularly as to the actions that took place inside the VDC.
- [52] The significance of the police responses to her requests for Murri Watch, ATSILS, or a PLO to attend is to be considered.
- [53] Ms Given's claim is founded on her being discriminated against in contravention of the Act.
- [54] Section 101 of the Act provides for an area of administration of state laws and programs:

101 Discrimination in administration of state laws and programs area

A person who –

(a) performs any function or exercises any power under state law or for the purposes of a State Government program; or

(b) has any other responsibility for the administration of State law or the conduct of a State Government program;

must not discriminate in –

(c) the performance of the function; or

(d) the exercise of the power; or

(e) the carrying out of the responsibility.

- [55] The police service was exercising power under the relevant police legislation. The area described in section 101 is therefore the relevant area.

³⁸ Submissions on behalf of the Respondent filed 29 March 2018, [40].

- [56] Direct Discrimination would occur if Ms Given was treated less favourably than another person without the same attribute:³⁹

10. Meaning of direct discrimination

(1) **Direct discrimination** on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different.

- [57] Indirect discrimination would occur if Ms Given had an unreasonable term imposed upon her having regard to her attribute:⁴⁰

11. Meaning of indirect discrimination

(1) **Indirect discrimination** on the basis of an attribute happens if a person imposes, or proposes to impose, a term –

- (a) with which a person with an attribute does not or is not able to comply; and
- (b) with which a higher proportion of people without the attribute comply or are able to comply; and
- (c) that is not reasonable.

- [58] The meaning of discrimination on the basis of an attribute is discussed in section 8 of the act as follows:⁴¹

Discrimination on the basis of an attribute includes direct and indirect discrimination on the basis of –

- (a) a characteristic that a person with any of the attributes generally has; or
- (b) a characteristic that is often imputed to a person with any of the attributes; or
- (c) an attribute that a person is presumed to have, or to have had at any time, by the person discriminating; or
- (d) an attribute that a person had, even if the person did not have it at the time of the discrimination.

- [59] The relevant test to be applied as to an attribute was considered by the Court of Appeal in *Woodforth v State of Queensland* ('*Woodforth*'):⁴²

Section 10 requires a comparison between a person with an attribute and a person without that attribute. The comparison is to be made by reference to a certain set of circumstances. In the case of the person with the attribute, that is the set of circumstances in which that person has been treated or the circumstances in which it is proposed to treat that person. In the case of a person without the attribute, who is commonly called in this context 'the comparator', they are hypothetical circumstances which are assumed to be the

³⁹ The Act, s 10.

⁴⁰ Ibid, s 11.

⁴¹ Ibid, s 8.

⁴² [2017] QCA 100, [29].

same or not materially different from those in which the person with an attribute has been or will be treated. In the present case, those circumstances included the context of a complaint by a person to police of criminal offending against her.

- [60] The Court of Appeal discussed the decision of the High Court in *Purvis v State Of New South Wales (Department Of Education And Training)* ('*Purvis*') and commented:⁴³

Further, the Appeal Tribunal incorrectly likened this characteristic of the applicant's impairment with the occurrences of violent behaviour that constituted the relevant circumstances in *Purvis*. They were occurrences which formed part of the factual context in which the student was treated. He was treated, by suspension and expulsion, in response to those occurrences. The required comparison was between the treatment of this student and the hypothetical treatment of another student. That hypothesis required the consideration of what would have been the treatment of another in response to occurrences of the same kind. The complication in *Purvis*, caused by the student's behaviour also being an incident of his disability, did not exist in the present case. In the present case the relevant 'treatment' was the response of police to a complaint of criminal conduct.

- [61] Those comments of the Court of Appeal were considered by the Tribunal in *Cook v State of Queensland (Queensland Police Service) & Anor.*⁴⁴ That involved a question whether a person who had been diagnosed with bipolar disorder was treated differently by police, who closed investigations into his claims of fraudulent activity.

- [62] The Tribunal discussed the comments of the Court of Appeal in *Woodforth* and commented that:⁴⁵

If the comparison shows that the person with the impairment was treated less favourably, the further question must be asked as to whether the impairment was the 'basis' for the less favourable treatment. The central question is therefore to ask why the aggrieved person was treated as he or she was?

- [63] The Member in that matter found that the police investigation was approached in a professional way and conducted appropriately, and there was no suggestion that the investigation was terminated because Detective Self was told that Mr Cook had bipolar disorder. The Member concluded as follows:⁴⁶

In any event, I find that the discovery that Mr Cook had bipolar disorder did not influence the conduct of the investigation nor was it the reason the investigation was closed. In my view, the detective had formed his own view based on his investigations that there was no evidence of fraudulent transactions.

⁴³ (2003) 217 CLR 92, [54].

⁴⁴ [2018] QCAT 216.

⁴⁵ Ibid, [31].

⁴⁶ Ibid, [52].

- [64] As noted, it is submitted on behalf of Ms Given that the comparator for the purposes of the act in this matter would be a person who:⁴⁷
- (a) was brought to the watch-house for a ticketable offence and managed by police officers;
 - (b) was mildly affected by alcohol, with a BAC of between 0.027 and 0.079;
 - (c) does not have PTSD and a degenerative spinal condition;
 - (d) did not exhibit behaviour characteristic of a person with PTSD and a degenerative spinal condition; and
 - (e) is not an aboriginal person.

[65] This specific description of the appropriate comparator is not directly challenged by the submissions of the State, but its submissions are to the effect that, in any event, she was not treated less favourably or had an unreasonable term imposed term imposed upon her, within such a comparator.

Treatment at Ms Given's premises

- [66] It is apparent on the evidence of Dr Hoskins, and of Ms Given herself, that Ms Given was under the influence of alcohol at the time that the police were called to the home unit at which she was residing.
- [67] It is not contested that Ms Given abused the police at her premises.
- [68] The police applied a 'number one come along hold' in taking her down the stairs from her unit to the police vehicle. Senior Constable Mitchell gave evidence that Ms Given was 'slightly obstructive and was pulling'. He described how the officers let Ms Given go from the hold after they walked her down the stairs because she was complaining about her back.
- [69] I am satisfied that the police officers acted appropriately in arresting Ms Given and taking her to the police vehicle - she was creating a nuisance, was not compliant with reasonable police requests and directions to stop calling out, and was using abusive language.
- [70] I am also satisfied that the police conducted the arrest with due consideration for the fact that Ms Given was under the influence of alcohol, but did not treat her any differently in the course of the arrest and movement to the police vehicle because of her intoxication. I am satisfied that she was treated in the same manner as an abusive and uncooperative person who was not affected by alcohol would have been treated.
- [71] I am also satisfied that the use of the hold was appropriate to control Ms Given as she was being uncooperative, pulling away, and there would have been a risk of injury to Ms Given or to the police officers if she was not appropriately restrained or controlled whilst descending the stairs. I accept that the hold was released when it was safe to do so, and with consideration for Ms Given's complaints about her back condition.

⁴⁷ Submissions on behalf of the Applicant filed 21 April 2018, [90].

Arrival at the watch-house

- [72] Upon her arrival at the watch-house, Ms Given was assisted from the police vehicle. Senior Constable Hull said that Ms Given was making reference to having a sore back, and that is why she held her hand out to Ms Given, who took it, and that she and Ms Holst then walked Ms Given over to where they needed to search her.
- [73] I accept the evidence of Senior Constable Hull that Ms Given was treated in a careful manner on arrival at the watch-house. She was assisted from the vehicle, was required to stand on the marked feet on the watch-house floor, and was then led to the processing counter.
- [74] Ms Given was complaining as she was being led from the police van that she had a bad back. I am satisfied that the police officers treated her with appropriate care, taking into account her advice that she had a bad back. There is no evidence that Ms Given's back was damaged in any way by her being taken from the police vehicle and being led to the processing counter.

Processing at the watch-house counter

- [75] The central matter relevant to the overall treatment of Ms Given in the watch-house relates to what occurred at the processing counter.
- [76] The evidence of Ms Holst is that she recalled the Charge Sergeant attempting to ask Ms Given the risk assessment questions, but that Ms Given didn't answer any of his questions. Ms Holst said that because Ms Given was an unknown risk, as she didn't answer any questions whatsoever, the decision was made to place her in a smock.
- [77] Ms Haigh also said that Ms Given refused to answer any medical questions, and referred to the notation in counter records that:⁴⁸

Prisoner was argumentative towards watch-house staff and refused to comply with any directions requested of her. Continually made demands whilst refusing to comply with any request made of her. Prisoner refused to answer any medical questions, so was changed into a smock.

- [78] Ms Haigh related that the health questions included; 'Have you attempted suicide? If so, when was your last suicide attempt?', and that if the prisoner does not answer those questions it is automatic that they get put in a smock.⁴⁹
- [79] The significant consideration is that Ms Given refused to answer the health questions. The consequence of not entering the health questions is that a person cannot be assumed to not be suicidal, or to be at risk of self-harm, and to not require close attention.
- [80] The standard practice, as described by the watch-house staff, in such a situation where a person fails to answer health questions is for them to be taken to the VDC, which is also known as a 'padded cell', and to be placed in a smock. This action is for the safety of the prisoner, and places them in an environment where they are less likely to cause harm to themselves by contact with the floor or walls of the holding cell, or by using their clothing to inflict self-harm.

⁴⁸ Transcript 20180306, 2-75, line 9.

⁴⁹ Transcript 20180306, 2-73, line 39.

- [81] As a consequence of not answering the risk assessment questions, Ms Given was then treated in the same way as another person who had refused to answer those questions.

Events in the padded cell

- [82] Ms Given was forcibly undressed once inside the padded cell and placed in a smock. To do so, she was forced to the ground by several officers. She described those actions as follows:⁵⁰

Ms Gover: Now, you were also questioned about a boot on your face and you said?

Ms Given: They had something on my face. I don't know what it is. I can't tell. When they threw me down on the floor like an animal. They threw me down.

- [83] Senior Constable Hull said that Ms Given was asked to put the smock on herself but would not do so.

- [84] Ms Given said in her evidence that she was uncooperative because she was scared:⁵¹

Ms Gover: Were there any other times during your interaction with police that night where you felt they were smirking or looking at you with a smart look on their face?

Ms Given: No, but I couldn't – I can't see through walls. No, I don't know. All I could feel was their attitude and my rights wasn't given to me, especially when – to feel safe. I just didn't feel safe at all. I was freaking out because I had never been treated like that and being told 'Get your top off' and that's because they normally would – they would have – in the past, they have put me in the cell by myself and given me that privacy to change into a smock, at least, to give me that bit of privacy. This time, they didn't. They were demanding me to take my top off and they were cornering me, and that's why I reacted because I freaking out thinking something bad was going to happen.

- [85] Senior Constable Hull commented on the video showing Ms Given being forcibly placed onto the floor of the padded cell:⁵²

Hull C: Do you want to stop it there? As you can see, when we transitioned her to the ground, we went with her. She wasn't just dropped from a height. I have transitioned her and actually placed her on the ground.

Ms Anderson: Is there anything unusual about that?

Hull C: No. I've done that hundreds of times. I know how to do it. There's one person on one arm, one on the other arm, and they are lowered down each and every time. I've put pregnant women with big pregnant bellies and lowered them to the ground, and you have to do it carefully. You can see, we go down with her. She's not dropped; we go down with her so that she's placed there.

⁵⁰ Transcript 20180305, 1-62, line 41.

⁵¹ Transcript 20180305, 1-60, line 9.

⁵² Transcript 20180307, 1-21, line 4.

- [86] I accept that Ms Given refused the opportunity given to her by the watch-house staff to change into the smock voluntarily, and that the watch-house staff were reasonably required to forcibly place her in the smock.
- [87] Ms Given alleges that in the course of being placed in the smock the watch-house staff used excessive force and that she suffered injuries as a result of the way that she was handled in the padded cell, which also aggravated existing conditions she had. She was asked about those injuries, and responded as follows:⁵³

Member: After you are discharged, apart from the injuries that you've referred to on your face in your arms, were there any other injuries?

Ms Given: – The – there's one that there's – with the hold grip, they had my arms. In those photos there you can't really see, but they have my arm photos that I've got there. Basically, my shoulder – when they had me pinned down in the padded cell, they have caused injuries to my shoulder and now I've got a pinched nerve that's out in my left – my left shoulder now and I've got to take medication which I wasn't on before. I've now got an additional medication that I've got to take for my shoulder, plus my spinal – anti-inflammatory for my spine.

Member: Tell me about your spine? –

Ms Given: I've got a bone degenerate disease where I've – because of my history of hospitality, fruit picking, child care – just normal career – basically, it's worn down. Where my spine sits like that and you've got the cartilage, that's worn down. So, basically, my spine is just going like that.

Member: All right. Well, did the incident in the watch-house cause you any injury in relation to your spine?

Ms Given: – Yes.

Member: All right. What was that?

Ms Given: – On there and my shoulder – mainly my left shoulder from when they pulled my arm back with my leg. I get pinching on the nerve on the shoulder now constantly and pins and needles on my left-hand shoulder.

Member: On your left shoulder. What about your actual spine?

Ms Given: – Yeah.

Member: Down your back, anything there?

Ms Given: – It's on the lower – lower base of my spine, like at the sciatica.

Member: And did you get that before this incident?

Ms Given: – I had that before. I had told the officers that I had a spinal injury and that they had it on their database of my injuries and my condition, medical condition, and my mental condition. Yes.

Member: So did the treatment at the watch-house do anything in relation to your lower back?

⁵³ Transcript 20180305, 1-16, line 14.

Ms Given: No, just my shoulder. They've – they've caused a shoulder. Left-hand shoulder. When they pull – pulled my arm back when they had me pinned down.

- [88] Senior Constable Hull said that Ms Given was held down before they left the padded cell. She said that one knee was on Ms Given's bottom, and that she was trying to use the least force possible.
- [89] The video recordings clearly show that Ms Given continued to be uncooperative when taken into the padded cell, refused to voluntarily put the smock on, and was struggling with the watch-house officers. Consequently the watch-house officers were required to use force to put the smock on her.
- [90] Whilst I accept that the watch-house staff used force to place Ms Given in the smock, I do not accept that their conduct was unreasonable or that they used excessive force. I accept the evidence of Senior Constable Hull and Ms Holst as to their descriptions of the events that occurred in the padded cell.
- [91] I am satisfied that in placing Ms Given in the padded cell and putting the smock upon her, the watch-house staff treated her in the same manner as they would any other person who had refused to answer the health questions, and was being uncooperative and refusing to voluntarily put on the smock.

Provision of indigenous support

- [92] Ms Given was calling from the time she first entered the watch-house for Murri Watch, ATSILS, or a PLO to attend her at the watch-house.
- [93] Ms Haigh said that in her nearly three years at the watch-house she had not seen a PLO attend the watch-house.
- [94] Ms Haigh said that if a prisoner had been to court and needed company, that Murri Watch would attend, but that 'normally we wouldn't get them in just because somebody had come in as a public nuisance'.
- [95] Senior Constable Hull's evidence was that this attendance at the watch-house by Murri Watch was irregular, and was not controlled by the watch-house:⁵⁴

Witness: We were trying to explain to her at that point that we don't – I have called Murri Watch in the past – I've been at the watch-house a long time – to attend when prisoners ask for them. They don't come when we call them. They come when they come, and that's what Watch-House Officer Holst was trying to explain, that if they come, we will let them know that she wants to see them. It is not our call to get them there. They come when they want to.

Ms Anderson: How often do Murri Watch people come to the watch-house? –

Witness: It varies. They can come twice a shift; can come twice a day. It's entirely up to them when they turn up.

Ms Anderson: Can you call them and ask them to come?

⁵⁴ Transcript 20180307, 1-19, line 4.

Witness:– I have in the past, and they've never – they don't do it. I have, in the past, are some to – if they could come and drive juvenile prisoners to South Brisbane to get them home, and they don't do that. I've asked some in the past, for people who have asked me, 'can you call Murri Watch? I don't have anywhere to stay tonight', and they won't take them, they won't allow prisoners to stay there unless they're drunk. That's not there – that's just not what they do.

- [96] Senior Constable Hull was asked in cross-examination about a Memorandum of Understanding between QPS and ATSILS, and about the Royal Commission into Indigenous Deaths in Custody. She was specifically asked about a policy in chapter 6.3.6 of the operational procedures manual which provided as follows:

Persons of Aboriginal and Torres Strait Islander descent should be considered people with a special need because of certain cultural and sociological conditions.

Upon request by an Aboriginal person or Torres Strait Islander person for legal advice or legal assistance at any stage during any investigation, officers should endeavour to contact the appropriate legal service.

- [97] Senior Constable Hull responded that the policy did not relate to the situation, because these events were not during any investigation:⁵⁵

Ms Gover ... And would you not comply with the spirit of this policy and treat an indigenous person in custody as a person with special needs because of cultural and sociological conditions, or comply with request for legal advice for assistance?

Hull C: Well, I'm – I'm trying to say to you, this doesn't apply to her because she wasn't being investigated. She was arrested. Investigation had already taken place. This doesn't relate to her. She is not entitled to a phone call to Aboriginal Legal Aid, in my – in – in my understanding. Yeah.

- [98] Senior Constable Hull was asked further about the Royal Commission into Aboriginal Deaths in Custody in relation to a suicide risk, in the context of Ms Given being kept in the padded cell for some time:⁵⁶

Ms Gover: So to you, 'deaths in custody', indicates some sort of suicide risk rather than concern that she might be injured herself or hurt?

Hull C: It indicates some kind of – some kind of death; whether she – it would be at her own hand or not, I can't take that and just ignore it. Like I say, I don't have a crystal ball and know whether she is going to hurt herself in custody. I've had an aboriginal girl go straight into the cells and within 10 minutes she had her – had her – had her shirt wrapped around her neck. I had to peel it off her. I said – so I would not want that to happen to anyone. I said it's most disturbing when that happens. I would rather put them in a smock and leave them in the padded cell for an hour to calm down and know they're not going to hurt themselves than have them wrap – wrap something around their neck. I said it's – it's most disturbing when that happens. So it's damned if we do and we're damned if we don't. If we ignored that comment about deaths in custody – could mean she is going to hurt herself. If I ignore that I

⁵⁵ Transcript 20180307, 1-40, line 45.

⁵⁶ Transcript 20180307, 1-56, line 26.

could lose my job and not – I know – didn't leave her in there and she had herself, I said, this so I have to err on the side of caution and that's why she stayed in there.

- [99] No evidence was adduced as to any standard procedure adopted in the watch-house when an Aboriginal or Torres Strait Islander prisoner was brought in and processed, as to the calling of Murri Watch, or ATSILS, or a PLO to attend.
- [100] The effect of the evidence of Senior Constable Hull is that the attention of the officers in the watch-house was focused upon keeping Ms Given in the safest situation possible by putting her in a smock and leaving her in a padded cell, where she was in a safe situation and to minimise any suicide risk.
- [101] That treatment of Ms Given did not disregard her vulnerability as an indigenous person.
- [102] The watch-house staff did not secure the immediate attendance of Murri Watch or ATSILS at the time of her processing or delay processing until such time as those organisations attended the watch-house in their normal, if irregular, routine. Those actions have not been demonstrated to contravene a set policy which the staff were required to follow.
- [103] Ms Given was displaying heightened behaviour and was being uncooperative. I accept that the primary concern of the watch-house staff was to place Ms Given in a safe situation in the padded cell for her own safety.
- [104] I am not satisfied that the non-compliance with Ms Given's requests for Murri Watch and ATSILS to attend arose from treatment of her that was unreasonable in the circumstances, or arose from discriminatory treatment.

Acknowledgment of PTSD

- [105] Ms Given refers extensively in her submissions to the effect of her having PTSD as a result of a history of violent abuse and domestic violence which she had previously endured. I accept that she does suffer from such a condition.
- [106] Ms Given was displaying behaviour that is characteristic of a person with PTSD who was responding to a situation where they found themselves anxious and scared.
- [107] Those behaviours however are not confined only to persons with PTSD and may be displayed by a person suffering from a variety of mental health conditions, or who are under the influence of alcohol or a drug.
- [108] I am not satisfied that the medical condition of PTSD, which Ms Given suffered from, was not properly taken account of by the police officers and watch-house staff.
- [109] Whilst Ms Given's history of PTSD may have been a causal factor for her behaviour at the watch-house, the essential issue is the treatment she was subjected to there. She was not placed in the padded cell or put in a smock because she was known to have PTSD. She was treated in the way she was because of her behaviour.

Conclusion

[110] I have found that Ms Given was treated by the police officers and watch-house staff in an appropriate manner, having regard to her behaviour.

[111] I am not satisfied that Ms Given was treated differently from someone without her attributes; or that unreasonable terms were imposed upon her having regard to her attributes, with which she could not comply.

[112] Consequently neither direct nor indirect discrimination under the Act is established.

[113] No discrimination having been established, the complaint is dismissed.